IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1896.

THE LOUISVILLE TRUST COMPANY,
Appellant,

vs.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,
Appellee.

THE LOUISVILLE BANKING COMPANY,
Appellant,

vs.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,
Appellee.

PETITION BY LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY for Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

G. W. KRETZINGER,
E. C. FIELD,
JAMES S. PIRTLE,
For Petitioner.

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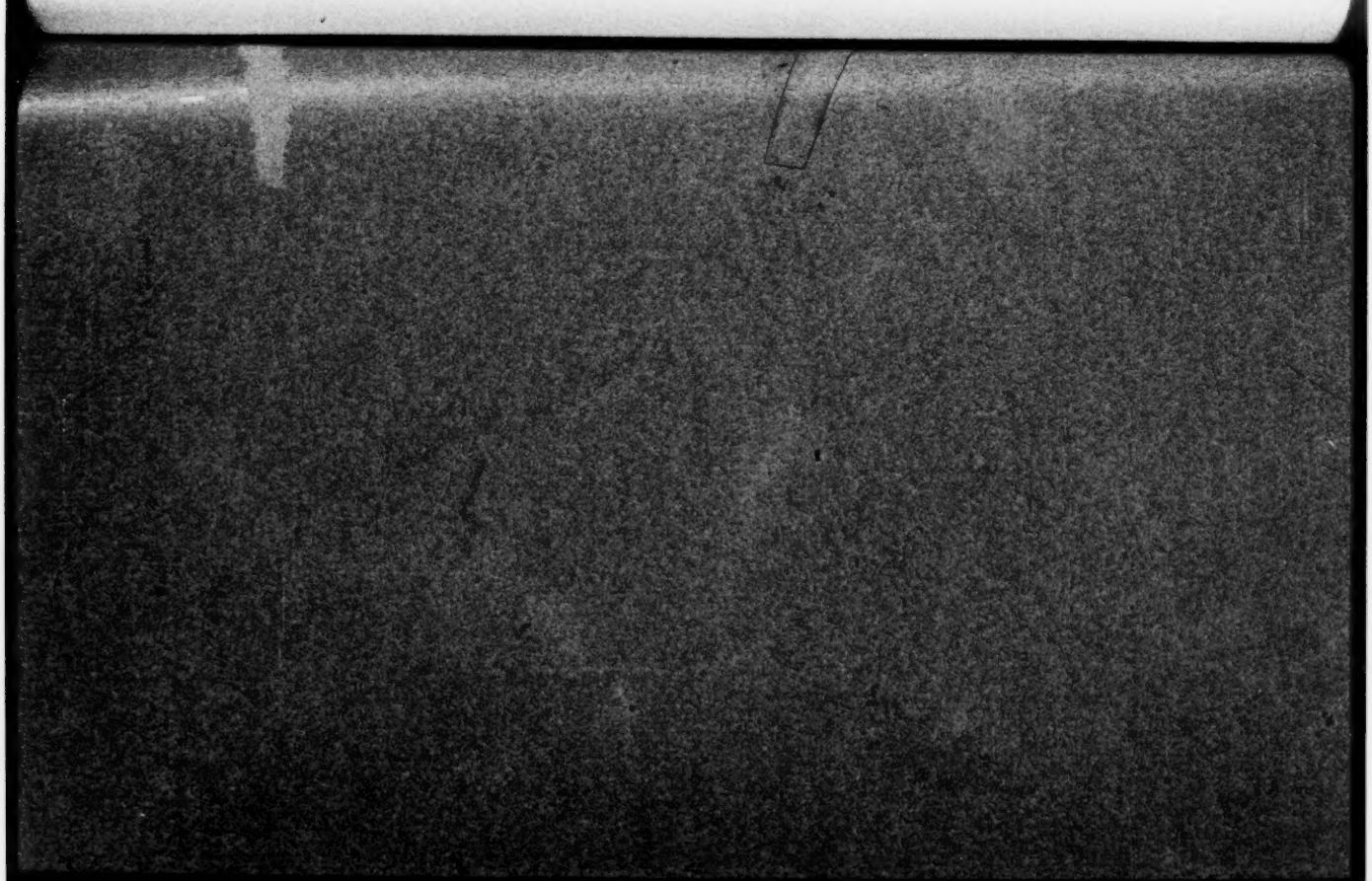

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Appellee.

NOTICE.

And now comes the Louisville, New Albany and Chicago Railway Company, by its counsel, and moves this honorable court to order, by *certiorari* or other process, the Circuit Court of Appeals for the Sixth circuit, or the judges thereof, to certify to this court, for its review and determination, the above entitled causes in said Court of

Appeals lately pending, wherein the Louisville Trust Company *et al.* were appellants, and the Louisville, New Albany and Chicago Railway Company was appellee, and in support of said motion herewith submits its petition and a certified copy of the full record in said cause now in said Circuit Court of Appeals.

GEO. W. KRETZINGER,
JAMES S. PIRTLE and
E. C. FIELD,
Solicitors for the Louisville, New Albany & Chicago Railway Company.

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LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY.

THE LOUISVILLE BANKING COMPANY

vs.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY.

MOTION.

Notice is hereby given that upon the verified petition of the Louisville, New Albany and Chicago Railway Company, appellee in the above entitled causes, and upon all the pleadings and proceedings herein, we shall, on Monday the ninth day of November, 1896, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which is here-

with served upon you) to the Supreme court of the United States at the capitol in the city of Washington, District of Columbia.

GEO. W. KRETZINGER,

E. C. FIELD,

JAMES S. PIRTLE,

Solicitors for Louisville, New Albany & Chicago Railway Company, Appellee.

The foregoing notice is hereby accepted this 12th day of October, 1896, by

ALEXANDER POPE HUMPHREY,
GEO. M. DAVIE,
For Ky. National Bank.

SWAGER, SHERLEY,
NOBLE & SHERLEY,
ST. JOHN BOYLE,
Solicitors for Appellants.

SHACKELFORD MILLER,
BARNETT, MILLER & BARNETT,
For Louisville Banking Co.

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Appellee.

THE LOUISVILLE BANKING COMPANY,
Appellant,

vs.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,
Appellee.

PETITION.

Petition of the Louisville, New Albany & Chicago Railway Company, for a writ of *certiorari*, requiring Circuit Court of Appeals for the Sixth Circuit to certify to the Supreme Court of the United States, for its review and decision, the appeal taken by the Louisville Trust Company *et al.*, against the Louisville, New Albany & Chicago Railway Company.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the Louisville, New Albany & Chicago Railway Company respectively avers and shows, to wit:

First. Your petitioner is, and was at the time it bro ught said suit, a corporation of the States of Indiana and Illinois, and was created and exists as such by virtue of a consolidation of certain Indiana Railway Corporations, with a certain railroad corporation of the State of Illinois, pursuant to the laws of both states.

That the Louisville Trust Company, the Ohio Valley Improvement and Contract Company (hereafter called Contract Company), the Richmond, Nicholasville, Irvine and Beattyville Railroad Company (hereafter called Beattyville Company), the Louisville Safety Vault and Trust Company, defendants to the bill brought by your petitioner, as hereinafter mentioned, are and were at the commencement of said suit, corporations organized and existing under and by virtue of the laws of the State of Kentucky, and are and were corporate citizens of said state; that the natural persons now remaining with them as co-defendants in said suit, are and were at the date of its commencement, citizens of states other than said States of Indiana and Illinois.

Second. This suit was brought by petitioner by bill in chancery in the United States Circuit court, at Louisville, Kentucky, to have adjudged void and cancelled the contract with the Contract Company and the guarantee upon certain of the Beattyville bonds, and for perpetual injunction to restrain suit upon such guaranty upon the ground that petitioner's directors had neither statutory power or authority to direct their execution. (See bill; Rec., 1, and the proposed amended bill; Rec., 206.)

The motion for a temporary injunction was resisted and was heard before Associate Justice Brewer and Circuit Judge Jackson (afterwards a member of this court).

Upon full argument the injunction was ordered to issue as prayed in the bill. Thereafter petitioner filed its supplemental bill and thereupon defendants or some of them filed demurrers to the bill and its supplement. These demurrers were heard before Circuit Judge Lurton and District Judge Barr, and were overruled.

The cause as finally heard before the Honorable John W. Barr, District Judge and final decree was rendered adjudging that petitioner had no corporate capacity to make such guaranty, and that the same as endorsed upon said corporate bonds by petitioner's executive officers was void, should be cancelled and suit thereon against petitioner perpetually enjoined.

From this decree an appeal was taken to the United States Circuit Court of Appeals for the Sixth circuit.

Third. The cause on appeal having been heard before Taft, Circuit Judge, and Severens and Hammond, District Judges, the opinion of the court was delivered June 22, 1896, by Taft, Circuit Judge, reversing the decree upon the ground that the contract and guaranty were valid upon the grounds and to the extent hereafter shown (opinion Circuit Court of Appeals; Rec., 160), and by its mandate commanded the lower court to dismiss petitioner's bill. (Rec., 200.)

A petition for a rehearing was duly filed (petition, Rec., 201) and was denied withoutan opinion. (Rec., 219.)

Petitioner also moved the court to modify the mandate and thereby allow petitioner to file its amended bill in the court below and submitted with said motion the amended bill proposed (petition to modify, amended and supplemental bill), (Rec., 204), which motion was overruled without an opinion. (Rec., 219.)

Petitioner shows that the Court of Appeals has misconstrued the opinion and decision of this court in *James* v. *Railway Company*, 161 U. S., 545, in holding that petitioner is an Indiana corporation for purposes of jurisdiction in the Federal courts, but is a Kentucky corporation for purposes of liability under the laws of Kentucky to a general unsecured indebtedness *in personam* by virtue of a statute held by Mr. Justice Brewer and Mr. Justice Jackson to be simply an enabling act conferring powers upon petitioner as an Indiana corporation.

That the judgment of the Court of Appeals in effect reverses the deliberate judgment of Mr. Justice Brewer and Judge Jackson, later a judge of this court, in dismissing a bill of complaint on which they granted an injunction on the 28th day of May, 1890, upon an elaborate argument of counsel, lasting almost two days, on the construction of the statutes of Indiana and Kentucky, and in which judgment Judge Lurton, Circuit judge, and Judge Barr, District judge, sitting in chancery, afterwards followed.

That the decision of the Court of Appeals holds that the doctrine of *Buchanan* v. *Leitchfield*, 102 U. S., 278, *School District* v. *Stone*, 106 U. S., 187, and *Dennett* v. *Evansville*, 161 U. S., 441, does not apply to *quasi public* corporations like railroads, but is limited to municipal corporations, which is a novel departure from settled principles, fraught with most dangerous consequences to the rights of stockholders, and directly antagonistic to the principles announced by Justices Brewer and Jackson, and which, if adhered to, will destroy the uniformity of decisions touching the most important questions that can arise in any court having cognizance of statutory corporate powers and great corporate securities and estates.

Fourth. The original bill alleges:

(*a*) That petitioner as complainant therein was an Indiana corporation.

(*b*) That it was created in 1881 by consolidation of certain Indiana and Illinois railroad companies.

(*c*) Article three of the articles of consolidation under which petitioner exists, limits its source of corporate powers for exercise to the laws of Indiana and Illinois.

Fifth. The Contract Company agreed with the Beattyville Company to build its road from Versailles to Beattyville, distance about ninety miles, (its nearest terminus to Louisville being about sixty-five miles; see Am. & Sup. bill, Rec., 209) and to take as part pay part of the stock and all of the first bonds of the Beattyville Company. (See contract, record, p. 16.) A quorum of petitioner's directors without corporate power or authority, agreed with the Contract Company to guarantee the Beattyville bonds and to receive three-fourths of the Beattyville stock that came to the Contract Company for construction.

The contract with the Ohio Valley Improvement and Construction Company for the guaranty in question contains the provisions and recites the form of the guaranty to be endorsed, as follows:

"4th. The said New Albany Company agrees to and with the said Construction Company that it will, from time to time, as the said first mortgage bonds are earned by and delivered to the said Construction Company pursuant to the terms of their said Construction Contract, guarantee the payment by the said Beattyville Company of the principal and interest of the said bonds in manner and form following; that is to say, by endorsing upon each of said bonds a contract of guaranty as follows:

"'For value received the Louisville, New Albany & Chicago Railway Company hereby guarantees to the holder of the within bond the payment by the obligor thereon, of the principal and interest thereof, in accordance with the tenor thereof. In witness whereof the said Railway Company has caused its corporate name to be signed hereto by its president, and its seal to be attached by its secretary.'

"6th. In consideration of the premises, the said Construction Company agrees to transfer and deliver to the said New Albany Company three-fourths of the entire capital stock of the said Beattyville Company, the said delivery to proceed *pari passu* with the guaranteeing of the said bonds by the said New Albany Company: $3,000 at par of the said stock being delivered for each $4,000 of bonds guaranteed."

The guaranty in the above form was actually endorsed on 1,185 of said bonds and was signed in the following form:

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,
By W. M. DOWD,
[SEAL.] *President.*
ATTEST:
JOHN A. HILTON,
Assistant Secretary.

(See contract, record, page 16.)

Sixth. On October 9, 1889, the executive officers of petitioner, without corporate power or authority, assumed to execute in the name of petitioner with the Contract Company, a paper writing, by which the payment of the principal and interest of $2,250,000 of the Beattyville bonds were to be guaranteed by petitioner as the

same were issued and delivered by the Beattyville Company to the Contract Company for construction work, and the Contract Company was to issue and deliver three-fourths of the $1,695,000 of the Beattyville stock received by it from the Beattyville Company under the construction contract.

Seventh. That the next day after such last authorized endorsement had been attempted, the annual meeting of the stockholders of petitioner convened for the election of the new board of directors, and thereupon adjourned to convene March 22, and at such adjourned meeting the new board reported that at a special meeting of the old board, held in the city of New York, October 9, 1889, only eight of the thirteen old directors were present, and they assumed to pass a resolution authorizing the execution of the aforesaid paper writing and guaranty of the Beattyville bonds thereunder; that such action was so taken by these eight directors without any notice to the other directors or stockholders of petitioner; that at that date the eight directors so assuming to act only held and owned in the aggregate some 400 shares of petitioner's stock out of 50,000 shares. (See original bill, Rec., 1, and proposed amended bill, Rec., 204.)

That thereupon the stockholders at such adjourned meeting, by resolution and by vote of over 32,000 shares of stock, *repudiated said paper writing and refused to approve the same;* that this was the *first* stockholders' meeting that convened, and the *first* notice these stockholders had of the attempted execution of this contract or of the guaranty on such bonds thereunder, and authorized legal proceedings to be taken, if necessary, to have such unauthorized and illegal contract and attempted guaranty canceled and their attempted enforcement

against petitioner enjoined; that notice of this repudiation was immediately served upon the Contract Company, and the cancellation of the attempted guaranty demanded; that on the 9th day of April, 1890, eighteen days after such repudiation by petitioner's stockholders, it filed its original bill for relief against such pretended contract and guaranty as therein prayed.

Eighth. After petitioner became an Illinois and Indiana corporation by consolidation, the Indiana legislature passed an act and therein expressly prohibited the guaranty of any railroad bonds in a foreign state by a mere resolution or act of directors or agents. (See sections, Indiana laws, 3951 a, b, c, Ex. D.)

The following facts were admitted and stipulated into the record by appellants:

"That no petition of any of the stockholders of the said company requesting said endorsement in the manner pointed out in section 3951 A. B. C. of the statutes of Indiana, or in any other manner was ever signed or executed, and no authority was conferred by said stockholders upon such directors, and such directors had *only* such authority as existed by virtue of their existence as such directors.

It is further agreed that the guaranteed bonds referred to, numbered from one to 600 inclusive were endorsed with such guarantee by the officers of the Louisville, New Albany and Chicago Railway Company on the day of December, 1889; that 585 of such bonds number from 601 to 1,185, inclusive, were so endorsed and delivered on the 11th of March, 1890; that the regular meeting of the stockholders of the Louisville, New Albany and Chicago Railway Cempany convened on the next day, March 12, 1890, and no meeting had been held after the above contract of guarantee had been entered into until such regular meeting was held on the 12th day of March, 1890, and on which day a majority of the board of directors were changed, and such meeting then

adjourned to the 22d day of March, 1890; that at such adjourned meeting the board of directors reported to the stockholders that the before mentioned bonds had been guaranteed, and a resolution was adopted by a majority of all the outstanding stockholders objecting thereto and disclaiming any liability by reason of such guarantee." (See stipulation, Rec., 60.)

Ninth. During the period covered by the foregoing transactions, petitioner was not authorized by any Illinois law to purchase the stock or guarantee the debt of any other corporation or enterprise,

APPELLANTS' DEFENCES.

Tenth. Appellants by answer denied that petitioner was an Indiana corporation and averred that when it filed its bill it was a corporation organized and existing in the State of Kentucky, pursuant to a special act of the legislature of that state, approved April 8, 1880, (about 13 months later petitioner was created an Inter State Company by consolidation of Indiana and Illinois corporations, aforesaid). That Section 1 of this alleged special Kentucky charter recites: "That the Louisville, New Albany & Chicago Railway Company, a corporation organized under the laws of the State of Indiana, is hereby constituted a corporation, etc."

Section 2 limits the power conferred to the acquirement of terminal facilities in the City of Louisville. It neither authorized the acquirment by purchase or construction of a road in Kentucky. It made no provision for the issue of stock for stockholders, or for directors or executive officers; it had no natural persons for incorporators.

(See this act, Exhibit A, hereto attached.)

Appellants further answered that the Kentucky amendment to this act approved February, 1882, authorized the guaranty in question.

(See amendatory act, Exhibit C, hereto attached.)

The first section of which reads: "That the Louisville, New Albany & Chicago Railway Company (not its directors because it had none) is hereby authorized and empowered to endorse or guaranty the principal and interest of the bonds of any railroad company now constructed or to be hereafter constructed within the limits of the State of Kentucky, etc."

Eleventh. Petitioner alleges in its pleadings.

(*a.*) That it never acted as a Kentucky corporation.

(*b.*) That after its creation by consolidation its Indiana constituent never held a stockholders' or directors' meeting and never had any executive officers whatever.

(See amended bill, Rec., p. 206.)

Petitioner attaches hereto, and as part hereof, all the provisions of the Kentucky and Indiana acts, the construction of which is here involved, including those cited and quoted in the opinion of the Circuit Court of Appeals, and also certain provisions contained in the articles of consolidation creating petitioner a corporation of Indiana and Illinois, to wit:

1. Sections 1 and 2 of the Kentucky act of 1880, marked Exhibit A.

2. Certain provisions of the articles of consolidation, marked Exhibit B.

3. Certain provisions of the amendatory Kentucky act of 1882, marked Exhibit C.

4. Section 3951, a, b, c, of the Indiana act of 1883, marked Exhibit D.

5. Certain provisions of the revised statutes of Indiana, marked Exhibit E.

The construction of the provisions of the foregoing statutes material to this case by Judge Barr, which followed the holdings of Justices Brewer and Jackson, and Circuit Judge Lurton, hereto attached and marked Exhibit F.

THE CONCLUSIONS REACHED BY THE CIRCUIT COURT OF APPEALS ARE INCONSISTENT AND DIRECTLY IN CONFLICT WITH THE DECISIONS OF THIS COURT.

The Circuit Court of Appeals held :

1st. After holding that petitioner was not a Kentucky corporation and that if it was, it was not as such a party to this suit (op. Rec. p. 167) it held that it was the intention of the Kentucky legislature "to make that which was an Indiana corporation a corporation of the state of Kentucky" (op. Rec. p. 168) and that as such Kentucky corporation petitioner had the power under the Kentucky law to make the contract in question.

2d. It also held that the Kentucky act of 1880 created petitioner a corporation in Kentucky but inasmuch as petitioner was the *sole* incorporator named in that act and was a corporate citizen of Indiana, its corporate citizenship could not be imputed to Kentucky. Therefore petitioner as such Kentucky corporation must be deemed and taken as a corporate citizen of Indiana : That is, Kentucky by this act created a Kentucky corporation in Indiana with Kentucky powers for exercise (op. Rec. p. 168).

It then held that as to forty-five bonds petitioner was liable as a Kentucky corporation but was not liable "as a corporation of Indiana and Illinois," notwithstanding it held :

(*a.*) That petitioner was not a Kentucky corporation :

(*b.*) That if there was such Kentucky corporation it was not a party to this suit :

(*c.*) That if the Kentucky act did create a corporation, it and the Indiana company were distinct corporations.

Neither the directors in assuming to authorize the contract or guaranty or the executive officers in signing the same, purported or assumed to act for or in the name of the Kentucky corporation, which in fact had no directors, stockholders or officers.

Yet the Circuit Court of Appeals held that the guaranty was in fact executed by the Kentucky corporation as well as by petitioner, as a corporation of Indiana and Illinois, and as to forty-five bonds the court of appeals ordered that the same be "stamped under the endorsement of the guaranties the words 'This guaranty is binding only on the Louisville, New Albany & Chicago Railway Company, a corporation of Kentucky. It is not binding on the Louisville, New Albany & Chicago Railway Company a corporation of Indiana and Illinois.'

"The complainant (your petitioner) is also entitled to an order enjoining suit on these bonds as a corporation of Indiana and Illinois."

Thus the Circuit Court of Appeals held that two corporations were jointly bound by the guaranty ; *first*, the Kentucky corporation, and *second*, petitioner, as "a corporation of Indiana and Illinois," although only signed by one, and by the above order released petitioner as the latter corporation and held the Kentucky corporation, thus making another and different contract of guaranty.

3d. The Court of Appeals further held: That as to purchasers with knowledge the guaranty is void, *because* the directors had no statutory power to authorize the execution of the guaranty and could have no authority to direct the same without petition from the stockholders as required in the Indiana act of 1883; but as to purchasers without notice the actual endorsement of the guaranty by such unauthorized direction of the directors bound the stockholders without their knowledge or consent, notwithstanding their prompt repudiation of both contract and guaranty. (op. Rec., p. 179. See opinion Circuit Court of Appeals, record 166. Finding and holding of Judge Barr, in the court below, that the repudiation was promptly made at the first meeting upon first notice, record 69.)

4th. That the Kentucky company passed into the consolidation of the Indiana and Illinois corporation *without* it appearing in the articles of consolidation that such Kentucky company was a party thereto by name or reference, said articles being only executed by the Louisville, New Albany and Chicago Railway Company *as* an Indiana corporation.

5th. That where a special power is vested *by express* statute in a designated body for exercise, a purchaser may presume that the same has been exercised by *such* body from the *mere* act of some *other* body, or from the *mere* manual signature of an executive officer of the corporation.

6th. That the *mere* act of the stockholders in electing directors, clothed the directors with the appearance of authority to exercise special power in addition to general or usual powers, notwithstanding the legislature vested the exercise of such special powers exclusively and

directly in the stockholders, and counsel for appellants admitted in their stipulation, as heretofore shown, that "*such directors had* ONLY *such authority as existed by virtue of their existence as such directors.*"

7th. That notwithstanding the question as to whether the Beattyville bonds were within the Indiana statute for guaranty had been expressly committed by the Indiana legislature to the stockholders for decision, persons purchasing the Beattyville bonds with the guaranty endorsed thereon might presume that that question had been determined by the stockholders even though such bonds were not within the Indiana statute.

8th. That the stockholders did promptly determine the question at the first notice and by resolution repudiated the contract of guaranty, which action of the stockholders was wholly disregarded by the court. (Op. Rec., 197 ; opinion Judge Barr, Rec., 69.)

9th. That a statute expressly vesting special power in the stockholders for exercise is a mere regulation between the members, and of the same effect as if written in the articles of incorporation or by laws.

10th. That a purchaser may indulge a presumption which becomes a substitute for special statutory authority to the agent, and that this presumption arises in the absence of the receipt of any consideration by the guarantor from the purchaser and in the absence of recitals or representations sufficient to create or feed an estoppel.

11th. The decision of the Circuit Court of Appeals in the above particulars and in other fundamental matters is in vital conflict with the decisions of this court and the rule uniformly applied in the interpretation and construction of statutes, creation of corporations, corporate powers and corporate agencies.

The importance of maintaining unbroken this line of Supreme court precedents touching these questions cannot be over rated. The one great objection urged in Congress to the Circuit Court of Appeals act was that it would make possible diverse decisions touching questions of gravity and importance. It was to obviate this objection that the clause for petition of *certiorari* was inserted.

12th. That your petitioner has no right of direct appeal or writ of error to this court under the Circuit Court of Appeals act, wherefore, your petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the sixth circuit, requiring said court to certify and transmit to this court a full and complete transcript of the record and all proceedings in that court in the above entitled cause, for review and determination by this court, as provided by law and that the judgment of reversal entered by said Circuit Court of Appeals may be reversed, with directions to it by this honorable court to affirm the decree of the court below.

And so your petitioner will ever pray.

The Louisville, New Albany & Chicago Railway Company.

By G. W. KRETZINGER,
E. C. FIELD,
JAMES S. PIRTLE,
Solicitors for Petitioner.

STATE OF ILLINOIS, }
COOK COUNTY. } ss.

Loyal L. Smith, being duly sworn states that he is a member of the law department for the petitioner, the Louisville, New Albany & Chicago Railway Company, and as such affiant is duly authorized to make this affidavit; that he has read the foregoing petition and that the facts therein stated are true.

LOYAL L. SMITH.

Subscribed and sworn to before me on this 4th day of November, 1896.

JOHN J. ROONEY,
[NOTORIAL SEAL.] *Notary Public.*

The provisions of various statutes, and the articles under which petitioner was created an Illinois and Indiana corporation, the construction of which is here involved, including those cited and quoted in the opinion of the Circuit court of Appeals, and referred to in the petition as Exhibits A, B, C and D, are as follows:

EXHIBIT "A."

Sections 1 and 2 of the Kentucky act under which the court of Appeals held that petitioner was created a Kentucky corporation, and thereupon became a corporate citizen of Indiana, are as follows:

Be it enacted by the General assembly of the commonwealth of Kentucky:

"1. That the Louisville, New Albany and Chicago Railway Company, *a corporation organized under the*

laws of the State of Indiana is hereby constituted a corporation, with power to sue and be sued, contract and be contracted with, to have and use a common seal, with the power incident to corporations and authority to operate a railroad."

"2. That the Louisville, New Albany and Chicago Railway Company is hereby authorized to purchase or lease for depot purposes in the city of Louisville, or county of Jefferson such real estate as may be deemed by it to be necessary for passenger and freight depots and transfer, machines shops and for all switches, and turnouts necessary to reach the same; and is also authorized to connect with any railroad or bridge now operated or used or which may be hereafter operated or used, in said county of Jefferson, and may build any such connecting lines, or lease or operate the same, and for all such purposes shall have the right to condemn all property required for the carrying out of the objects herein named, and may bond the same, and secure the payment of any such bonds by a mortgage of its property, rights and franchises."

EXHIBIT B.

Certain provisions contained in the articles of consolidation under which petitioner was created a corporation of Indiana and Illinois of date May 5, 1881, are as follows:

"This agreement was made this 5th day of May, A. D. 1881, between the Louisville, New Albany & Chicago Railway Company as party of the first part, and the Chicago and Indianapolis Air Line Railway Company, as party of the second part:

Witnesseth: That whereas the party of the first part is a corporation existing under the laws of the State of Indiana, with a share capital of $3,000,000, and has constructed, owns and operates a line of railroad extending from the city of New Albany, Floyd county, Indiana, to

Michigan City, La Porte county, in the same state, and

Whereas, the said party of the second part is a consolidated corporation, *organized and existing under the laws of the states of Indiana and Illinois* with a share capital of $2,000,000 and has in process of construction a line of railway extending from the city of Indianapolis, Marion county, Indiana, to a connection with a railroad at or near Glenwood, Cook county, Illinois, so as to secure a connection and entrance to the city of Chicago, Illinois, and

Whereas, the lines of railroad so described as aforesaid and belonging respectively to said parties of the first and second parts intersect and connect with each other at Bradford, White county, Indiana, so as to allow the free interchange of traffic between each other, and if joined, united and consolidated, would form a line of railroad connected from the cities of New Albany and Indianapolis, Indiana, to the city of Chicago in the State of Illinois, and

Whereas, the said parties hereto have full power and authority *under the laws of the States of Illinois and Indiana* to consolidate their stocks and properties, * * * etc.

Now, therefore, in consideration of the premises * * * the first and second parties do hereby mutually covenant and agree * * * to unite, merge and consolidate the said two corporations and all their railroads, properties, stock and franchises of every kind so as to create and form a consolidated corporation, to be called and known as the "Louisville, New Albany & Chicago Railway Company," on the terms and conditions hereinafter specified.

Article 2 conveys to such consolidated company all the properties and franchises of the Indiana and Illinois constituents.

Article 3 provides that "the said consolidated corporation hereby created shall be vested with all the rights, privileges, immunities and franchises which usually pertain to railroad corporations under the laws of the respective States of Illinois and Indiana," etc.

Article 4 made the united stocks of the constituents the authorized issue of the consolidated stock and made stockholders of the constituents stockholders of the consolidated company with the right to exchange constituent for consolidated stock, upon the basis agreed upon.

Article 7 provided that immediately upon the consummation of the consolidation the board of directors of the first party, the Indiana constituent should constitute the board of directors of the consolidated company until its first election.

(See articles of consolidation record pp.).

At that date there was *no law* in force in Indiana or Illinois authorizing railroad corporations of those states to guarantee bonds of another corporation in their own or in adjoining states, and the absence of such power was in full legal effect an express prohibition against its exercise.

C.

About a year after petitioner was created by the consolidation of Indiana and Illinois companies as aforesaid the Kentucky legislature passed an act which the Circuit Court of Appeals held authorized the executors officers of petitioner to make the guaranty in question, to wit:

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"1. That the *Louisville, New Albany & Chicago Railway Company* is hereby authorized and empowered to indorse or guarantee the principal and interest of the bonds of any railway company now constructed, or to be hereafter constructed, within the limits of the State of Kentucky, and may consolidate its rights, franchises and privileges with any railway company authorized to construct a railroad from the City of Louisville to any point

on the Virginia line, such endorsement, guarantee or consolidation to be made upon such terms and conditions as may be agreed upon between said companies; or it may lease and operate any railway chartered under the laws of the State of Kentucky; provided it shall not lease or consolidate with any two lines of railway parallel to each other; or it may make such traffic arrangement or agreement with any such before mentioned road as its board of directors may deem proper."

"2. This act shall take effect upon and after its passage.

Approved April 7, 1882.

D.

Nearly two years after petitioner was created by such consolidation the Indiana legislature enacted the law approved March 8, 1883, to wit:

"3,951 *a*. Guaranty of Bonds of another Company. The board of directors of any railroad company organized under and pursuant to the laws of the State of Indiana, whose line of railway extends across the state in either direction, *may*, UPON THE PETITION OF THE HOLDERS OF A MAJORITY OF THE STOCK OF SUCH RAILWAY COMPANY, direct the execution by such railway company of an endorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining state, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway so endorsing or guaranteeing such bonds."

"3,951 *b*. Petition of stockholders. 2. *The petition of the stockholders specified in the preceding section of this act* SHALL STATE THE FACTS *relied on to show the benefits accruing to the company endorsing or guaranteeing the bonds above mentioned.*

"3,951 *c*. Limitation of the power. 3. No railway company shall, under the provisions of this act, endorse or guaratee the bonds of any such railway company or companies as is above mentioned, to an amount

exceeding one-half of the par value of the stock of the railway company so endorsing or guaranteeing as authorized under this act."

There was no law in force in Illinois authorizing either a domestic corporation of that state or any Illinois constituent of a consolidated interstate company to purchase the stock or guaranty the debt of any other corporation, corporation or enterprise.

Exhibit E.

The general statute of Indiana from which the court of appeals in its opinion quoted from two sections *only*, (namely Secs. 3949 and 3951), consists of seven sections whichappear in the Revised Statutes as Sections 3449 to 3951 inclusive.

The following being the only provisions material to the question here presented, which include the provisions quoted by the Court of Appeals:

3945. Roads. How Sold. 1. In case of the sale of any railroad and its property under or by the authority of any competent court or courts (part of which railroad may be situate within the State of Indiana, and part situate in an adjoining state, and embraced in the mortgage or mortgages or deed or deeds of trust), it may be sold at one time and place as an entirety, at such point on the line of said railroad, either within or without the state, and upon such notice as the court or courts ordering such sale may direct.

3946. Incorporation by purchasers. 2. In case of the sale of any railroad and its property (now situated wholly or partly within this state, *or* situated partly in this state and partly in an adjoining state), by virtue of any mortgage or mortgages, or deed or deeds of trust, either by foreclosure or other judicial proceedings, or

pursuant to any power contained in such mortgage or mortgages or deed or deeds of trust, or by the joint exercise of such powers and authorities, the purchaser or purchasers thereof * * * may form a corporation, by filing in the office of the Secretary of State a certificate specifying, etc.; and the persons signing said certificates and their successors, shall be a body corporate, and politic by the name in said certificate specified, *with power* to sue and be sued, contract and be contracted with, *and maintain and operate the railroad in said certificate named*, etc.

3947: "* * * And provided further that such corporation when so formed and organized shall in suing and being sued, *and in operating such railroad be subject to the general laws of this state* and NOT INCONSISTENT WITH THE ORIGINAL CHARTER OF SAID RAILROAD AND THE AMENDMENTS THERETO.

3949: *Note.* "The *original* charter" means the Indiana charter provided for in Sec. 3946. "* * * The said corporation shall have capacity to hold, enjoy and exercise within other states the aforesaid faculties powers, rights, franchises and immunities, and such other as may be conferred upon it by any law of this state or of any other state in which any portion of its railroad may be situate or in which it may transact any part of its business."

Note. This provision of Sec. 3949 was quoted by the court of appeals. The "said corporation" is such and only such as are incorporated under 3946, the powers of which are restricted by Sec. 3947 and cannot be inconsistent with the "*original*" (Indiana) "*charter.*"

3951. *Purchase and consolidation of branch roads.* (The following quoted in opinion Circuit Court of Appeals):

7. Any railroad company incorporated under the provisions of this act shall have the power and authority to acquire by purchase or contract the road, road bed, real and personal property, rights and franchises of any other corporation or corporations, which may cross or intersect * * * may also purchase or contract for the use and enjoyment, in whole or in part, of any railroad or railroads lying within adjoining states; and may assume such of the debts and liabilities of such corporation as may be deemed proper. (The following not quoted or considered by Court of Appeals): *Upon purchasing any such railroad or railroads*, * * * the same shall become vested in the railroad company so purchasing the same, * * * AND THE COMPANY SO PURCHASING OR ACQUIRING THE TITLE TO OR USE OF SUCH RAILROAD OR RAILROADS SHALL HAVE POWER TO COMPLETE, MAINTAIN AND OPERATE THE SAME. Any railroad company incorporated *under the provisions of this act* shall also have power to consolidate with other railroad corporations in the continuous line, either within or without this state, upon such terms as may be agreed upon by the corporations owning the same. * * * *All railroads purchased* * * * shall be vested in and become a part of the property of the corporation so purchasing or constructing the same, as aforesaid; and shall be, in all things, governed by the laws, rules and regulations *governing the corporation purchasing* * * * the same, as aforesaid, and be operated as a part of its line of road. * * * *But the powers* of *consolidation and purchase* shall be, and are hereby, *limited* and *restricted to such roads within the State of Indiana* as may cross and intersect the same, etc.

EXHIBIT "F."

Touching the foregoing statutes, and upon final hearing, Judge BARR, among other things, held:

"The decision of Justice Brewer and Judge Jackson, after full consideration, that this court had jurisdiction of this cause and the granting of the injunction should, we think, settle for this court some of the questions argued by counsel.

This decision determined that the complainant is an Indiana corporation and *not* a Kentucky one; hence, whatever authority the complainant had or has to guarantee the mortgage issued by the Richmond, Nicholasville, Irvine and Beattyville Railroad Company is derived from the corporate powers granted by that state. *It also determined* that upon the then showing the complainant was entitled to an injunction to prevent the disposition by the Ohio Valley Improvement and Contract Company and others of the bonds of the Beattyville Railway Company with the guarantee of the complainants upon them.

* * * * *

The consideration of the guarantee on the coupon bonds of the Beattyville Railway Company was to be the delivery of three-fourths ($\frac{3}{4}$) of the capital stock of that railway company to complainant by the Ohio Valley Contract Company.

The guaranty which was endorsed on $1,185,000 bonds is as follows":

(Then follows the words of the guaranty as heretotore shown.)

The court then cites sections 3951-a, b and c, of the Indiana statutes, which is fully quoted with the other statutes here presented. Judge Barr then continued:

"The provisions of the Indiana statute seem to have been ignored and the guaranty made presumably under the supposed authority of an act of the State of Kentucky approved April 7, 1882. *But as complainant is not a Kentucky corporation, this guaranty cannot be sustained or aided by this statute.*

By the Indiana statute quoted * * * *the stock-hold-ers, and not the board of directors*, are to take the initiative and a majority thereof determine whether there shall be a guaranty of the bonds of another company. * * * *But the authority does not exist except by and through the stockholders.* The provision of this statute which requires the facts which are relied on to show the benefit accruing to the company endorsing or guaranteeing the bonds to be stated in the stockholders' petition, clearly shows *the authority* to guarantee the bonds of another company *was not intended to be given the board of directors.*

There is no question here as to the effect of a subsequent approval or ratification of the guaranty of these bonds by the board of directors, by the stockholders *as their action was promptly repudiated* by them the first meeting after the guaranty was made and presumably as soon as it was practical to have had a stockholders' meeting.

The court then refers to other Indiana statutes and to the provisions thereof stated and quoted in the opinion of the Circuit Court of Appeals and of them says:

"These powers are such as to consolidate with other railroad companies and to buy and lease by way of extension of their railway lines, other railroads, etc., but the authority to guarantee the bonds of another railroad company is given in express terms in section 3,951, and the mode prescribed, and we think this precludes any implied authority arising to guarantee bonds in cases covered by that section in the exercise of other corporate powers given in other parts of the statute."

Judge BARR then cited and quoted, and thereon held that the guaranty was void as between petitioner and the Ohio Valley Contract Company, and as to the rights of defendants as alleged innocent purchasers said:

"The nature of the contract should have been notice to all purchasers to inquire into the corporate powers of the guaranteeing railway company, *as it was unusual and out-*

side of the ordinary business of a railway company either in operating or constructing railroads.

Purchasers on the bond market were bound to know that the president and board of directors of complainant were not the corporation, but its agents, and that the corporate power to guarantee these bonds did *not ordinarily* exist in the directory. There were *no recitals* either in the resolution of the board of directors or in the guaranty itself to mislead the purchaser or stay inquiry. * * *

In speaking of notes and bonds issued or accepted by an agent, acting under a general or special power, the Supreme court says: 'In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper *cannot* be used to establish the authority by which it was originally issued.' See Floyd Acceptances, 7 Wall., 676, and approved in *Marsh* v. *Fulton County*, 10 Wall., 683."

The judge then quotes *Merchants Bank* v. *State Bank*, 10 Wall., and said:

"This language is applicable as in that case where the company had the corporate authority to make the contract and the agent who made it was within the general scope of his duties, though not especially authorized to make the contract in controversy, *but it cannot be true*, broadly stated, else stockholders in corporations would be without the protection of limitations and conditions placed upon their corporation by the charter, *and the state itself* would be without the power to prescribe conditions to the exercise of corporate powers or prescribe the mode or agencies by which corporate powers should be exercised.

* * * * *

This condition, precedent to the corporate authority of the board of directors, was not performed, or attempted to be performed. * * * We do not, therefore, see that the position of these bondholders who are *bona fide* purchasers without notice is other or different from that of the Ohio Valley Company."

Judge Barr concluded:

In the case at bar the initiative was to be taken by the stockholders and they were to determine whether there should be a guaranty and direct the directors by a petition in writing giving the facts upon which they based their determination. This extraordinary corporate power was to be exercised by the stockholders themselves, and not their agent, the board of directors, and in a way and manner that all who dealt with the corporation could know if they desired. These two cases, (*Tappan* v. *Ry. Co.* 1st Flippin, 75, and *Zabriskie* v. *Ry. Co.*, *supra*) both in principle and facts, fall far short of the present case."

In so holding Judge Barr adopted and concurred in the decisions of Associate Justices Brewer and Jackson and Circuit Judge Lurton, in overruling the plea to the jurisdiction of the court, in granting the motion for a temporary injunction, and in overruling the demurrer to the original bill and supplement as above stated.